PETOWA JAYA SDN. BHD. v. BINAAN NASIONAL SDN. BHD.

[O.C.J. (Peh Swee Chin J.) 21 November 1987]

[Ipoh – Civil Suit No. 671 of 1985]

Civil Procedure – Mareva injunction – Application for – Building contract – Principles applicable – Whether conditions necessary for Mareva injunction satisfied.

The plaintiff was the sub-contractor for certain road-works. The defendant was the main contractor who sub-contracted the work to the plaintiff. The consideration for the defendant sub-contracting the works to the plaintiff was 2% of all payment received for value of work carried out by the plaintiff, with the plaintiff taking 98% of the same.

Thereafter the defendant wrote to the plaintiff and terminated the contract between them. The main complaint of the defendant was that the work was not done diligently and regularly.

The plaintiff, *inter alia*, sought a Mareva injunction.

Held: (1) the conditions necessary for a Mareva injunction were satisfied in the present case. There was no ground at all for sending the said notice of termination in the first place, and even if there was some ground for it, it was unreasonable in the circumstances. The defendant was in any event itself in breach of contract for failure to pay over to the plaintiff 98% of each of the several progress payments. There was also solid evidence that the probity of the defendant could not be relied on. The court had also considered the evidence of both sides;

(2) the Mareva injunction was therefore granted.

Cases referred to:

(1) *S and F International Ltd.* v. *Transcon Engineering Sdn. Bhd.* [1985] 1 M.L.J. 62 (folld).

(2) *Ninemia Maritime Corpn.* v. *Trave etc. & Co.* [1984] 1 All E.R. 398 (folld).

CIVIL SUIT.

Jeffrey Tan for the plaintiff.

Vincent Lim for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: The defendant has appealed to the Supreme Court against a Mareva injunction which I granted. I now give my grounds of decision.

Both parties were contractors, involved in this case in the construction of that section of the toll expressway from Ipoh to Sungei Perak referred by the parties herein as section 1.1 (hereinafter called the said work).

A statutory body of the Malaysian government, *i.e.* Malaysian Highway Authority or Lembaga Lebohraya Malaysia, gave a contract to a foreign company, *i.e.* Halla Construction Co. Ltd. of Korea in respect of the said expressway. Halla Construction Co. Ltd. in turn sub-contracted the said work to the defendant which in turn sub-contracted the said work to the plaintiff which was euphemistically referred to in the contract between the parties hereto as the "manager". It was left to the plaintiff alone to carry out the entire and actual work at the entire expense and resources of the plaintiff.

The consideration for the defendant sub-contracting the said work to the plaintiff, it was not disputed, was 2% of all payment received for the value of work carried out by the plaintiff, with the plaintiff taking 98% of the same. It was not in dispute also that payment for work done was by means of progress payments numbered consecutively.

Things appeared to go well for some time, until 3 July 1984, when on that day, the defendant wrote to plaintiff and terminated the contract between them dated 2 November 1982. According to the affidavit filed on behalf of the defendant, the defendant had apparently received some complaint from the head-contractor, *i.e.* Halla Construction Co. Ltd., that the said work had not been carried out with diligence, and that quality of the said work was low. The plaintiff replied that the termination was wrongful and chose to keep the contract alive and has claimed specific performance of the contract and/or damages for breach. On 4 July 1984, true to what it said in the notice dated 3 July 1984, the defendant took over the entire site, took possession of all equipment of the plaintiff and apparently engaged the same workers of the plaintiff or a great number of them. The plaintiff claimed, in connection with such workers, that it was the result of the defendant wrongfully inducing breach of contract of employment between the plaintiff and its former workers.

It would be pertinent to refer to the notice of termination of the contract. The defendant expressed in such notice great disappointment in not receiving certain details or reply as requested by its earlier letter dated 22 June 1984. It then concluded that the plaintiff was not capable of proceeding with the said work regularly and diligently. The defendant, in the said notice, said further that in order to maintain its reputation as a contractor, it was now forced to terminate the employment of the plaintiff as "the manager".

The words "diligently" and "regularly" were echoed back by clause 12(a)(ii) which I will set out below:

"12(a)(ii). If he fails to proceed regularly and diligently with the said works; then, if such default shall continue for ten days after a notice by registered post or recorded delivery specifying the default had been given to him by Bina, Bina may without prejudice to any other rights or remedies thereupon by notice by registered post or recorded delivery determine the employment of the manager under this agreement; provided that notice in pursuance of this clause shall not be given unreasonably or vexatiously and shall be void if Bina is at the time of the notice in breach of this agreement;"

It will be apparent that the prerequisite of the notice in question or the said notice of termination would be that such notice would have to be preceded by another earlier notice sent previously by registered post or, by another method of delivery which they called 'recorded delivery", specifying the default and that such default should have already continued (uncorrected) for ten days before a notice of termination of contract was issued. It was also provided that the notice of termination, in any event, must not be unreasonable, or given vexatiously. Further, it provided that the notice of termination would be void, apart from anything else and in any event, if at the time of notice, the defendant itself was in breach.

To such notice, the plaintiff gave a reply, complaining of the failure of the defendant to specify the default, mentioning the explanation that had already been given by the plaintiff to the defendant's letter dated 22 June 1984, at a meeting of the parties hereto on 26 June 1984.

The reply of the plaintiff further alleged that the defendant had instigated the plaintiff's workmen to work for the defendant instead. The said reply further stated, *inter alia,* that the defendant had failed to pay the plaintiff the progress payments for May and June 1984 for work already done and that the defendant had further held a retention sum in connection with the said work, in the sum of $700,000.

The affidavit filed in support of the plaintiff's application for a Mareva injunction further exhibited two letters, *viz.* "exhibit SLS 5" and "exhibit SLS 6" dated 10 July 1984 and 21 August 1984 respectively, both addressed to the plaintiff from the defendant, and both sent after the said notice of termination. Before dealing with the contents of these two letters from the defendant, I think I should revert to the said affidavit of the plaintiff once more. The defendant not only refused to return all the equipment and appliances of the plaintiff after the said notice of termination, but proceeded to make use of them, without the consent of and against the wishes of the plaintiff.

In the same affidavit, the plaintiff further complained that it had not been paid the progress payments nos. 20, 21, 22 and 23 for value of work already done, and the defendant had received the money and converted to its own use the same, as evidence for which the said two letters were exhibited by the plaintiff. In this connection, it was not in dispute that payments must have been made by the head-contractor. Though nowhere expressly stated, progress payments must have been made only as a result of the work done being certified as done by some responsible officer of the head-contractor.

The first of the two letters, *i.e.* the one dated 10 July 1984, had the heading worded as follows: "Receipt of $567,523.35, Progress Payment No. 22, Toll Expressway." The said letter then set out the disbursement of sums totalling $557,523.35 out of the sum mentioned in the heading for various purposes. In the said letter, the defendant said that the plaintiff had failed to execute the work satisfactorily as evidenced by complaints from the Korean contractor, *viz.* Halla Construction Co. Ltd. The complaints had been made known to the plaintiff from time to time, and the plaintiff should be aware of them.

The defendant further said that the plaintiff had not executed the work with due diligence, and that by letter dated 22 June 1984, the defendant required the plaintiff to carry out the said work diligently but the plaintiff had failed to do so.

The crucial letter dated 22 June 1984 itself did complain of the work not being carried out diligently. The letter, instead of applying and confining itself to the matter of default, sought a number of particulars such as the number of subcontractors, names of surveyors, mentioning also certain items of defective work, described in very vague terms as such, *e.g.* mixing materials not approved, very poor safety measures *etc.* These so-called items of defective work, assuming them to be defective work, were set out in a small paragraph marked as paragraph 6, whereas the five previous paragraphs were concerned with such particulars of the kinds set out above, making these so-called items of defective work sound like

trifling matters by comparison, and throwing doubts on the *bona fides* of the complaint of defective work, suggesting a somewhat flippant attitude of the defendant itself towards the so-called defective work.

The defendant's director further deposed that it was entitled to detain all the equipment of the plaintiff for use by other contractors that might be employed by the defendant.

About the detention of 98% of the progress payments to which the defendant was solely entitled, under the terms of the contract between the parties hereto, the said director denied misappropriation of such money to which, he deposed, the plaintiff was no longer entitled, as the defendant was entitled to set off against the money so detained, with the amount of damages suffered by the defendant for breach of contract on the part of the plaintiff.

The defendant's director further deposed to the defendant being a company of reputable standing, annexing to his affidavit a dossier about the defendant's structure. The defendant was described as a member of the Melewar Corporation, suggesting that the Melewar Corporation was an extremely wealthy and famous corporation. From the dossier, the defendant appeared to have an issued and paid-up capital of 2.6 million shares of $1 each (*i.e.* $2.6 million), and the total amount of indebtedness was $1.5 million. Melewar Corporation would appear to be the major shareholder holding 2,050,000 shares of $1 each fully paid. It is to be remembered that the defendant was a company registered with limited liability and in law had a separate existence of its own from the majority shareholder of its issued capital.

What are the principles applicable to a Mareva injunction? In *S and F International Ltd.* v. *Transcon Engineering Sdn. Bhd.*,[1] the Federal Court adopted and approved the principles set out in an English case, *i.e. Ninemia Maritime Corpn.* v. *Trave etc. & Co.*,[2] and the judgment in that English case was upheld on appeal to the English Court of Appeal. At p. 6 the Federal Court said:

"Mustill J. held ... that (1) before a Mareva injunction will be granted, the plaintiff must show first that he has a good arguable case which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty percent chance of success; (2) before such relief is granted, the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, *e.g.* that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice; (3) in reaching its conclusion the court should take into account the defendant's evidence as well as the plaintiff's ..."

Applying the above principles, the court was quite satisfied that the first condition was more than satisfied. I will give the reasons below.

First of all, so very often the court has had to deal with matters connected with the so-called retention sum (the subject-matter of the injunction as granted), agreed by both parties to be held back by an employer out of money certified to be due by usually an architect for actual work done by such employer's contractor. I did not think it necessary to get confirmation from both counsel of the nature of the said retention sum. The retention sum is usually held by the employer until the defect-liability period expires; such defect-liability period is always set out in all building contracts. If defects are found, the contractor is to make good the same, failing which the employer will do so by having recourse to such retention sum. The retention sum, by its very nature, belongs to the contractor, but its payment is delayed for the purpose of remedying defective work.

Defective work, in the face of such provision for the retention sum, would appear to be a breach of some term, the breach of which may be strongly argued as a term which does not entitle an employer to terminate or rescind a contract, but only to claim for compensation or damages for which the retention sum is intended. If the complaint of the defendant was about defective work, and this was the only possibly legitimate complaint one could glean from the said letter dated 22 June 1984 before the said notice of termination, then it would be a good arguable point that in the circumstances, the defendant was not entitled to terminate the contract as it had done.

The same conclusion would be arrived at by a consideration of clause 12(a)(ii) which did not speak of defective work, an expression that could have been used without the slightest difficulty, a common expression inserted almost invariably in any building contract. It spoke of the contractor (the plaintiff) failing to proceed (*i.e.* to start and to get on or continue) with the said work, regularly, and diligently (*i.e.* industriously or hardworkingly). It did not deal with any failure to supply any particulars of names of sub-contractors, sur-

veyors, *etc.* as asked for in the defendant's letter dated 22 June 1984 or with defective work. From the word "diligently", one could visualize workmen not stopping or delaying certain work, or not taking rest for a longer period than was necessary. The word "diligently" was used, be it noted, in association with the word "regular"; it should, more probably than not, mean only "industriously" or "hardworkingly". No instances of work not being continued regularly or diligently were really given in substance in the letter dated 22 June 1984, but only the request for particulars as regards sub-contractors *etc.*, and poor quality of work *etc.* amounting to defective work. Again the word default used in the same clause would *prima facie* be read together with the other words "diligently" or "regularly", *i.e.* the word default should, more probably, mean a failure to proceed with the said work diligently or regularly. It should not in the context be stretched to mean defective work; otherwise, for another reason, one may ask oneself if such defective work of such a gigantic scheme as the said work could ever be remedied within a rigid time frame of ten days as provided in clause 12(a)(ii).

In the circumstances, I repeat it would be quite a good arguable point to say first, there was no ground at all for sending the said notice of termination in the first place; secondly the said notice of termination, if there was some ground for it, was unreasonable in the circumstances; and that the defendant was, in any event, itself in breach of contract for failure to pay over to the plaintiff 98% of each of the several progress payments received at the time of the said notice of termination. The detention of such 98% of the progress payments was actually admitted but the defendant tried to justify the same.

The second condition laid down by Mustill J., duly approved by the Federal Court, was also satisfied, *i.e.* there was solid evidence that the probity of the defendant could not be relied on. The undisputed detention and use of the plaintiff's equipment, without the consent of plaintiff, and above all, the undisputed detention of 98% of progress payments No. 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard to the agreed retention sum with which the Mareva injunction was concerned; in other words, the defendant would, far more probably than not, dissipate the agreed retention sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.

The third condition of Mustill J. had also been satisfied in that the court had in fact, by the sheer force of necessity, also considered the evidence of both sides.

The court, of course, did not decide final questions of liability and it would depend on evidence and submissions at the trial to determine them. Of the granting of the interlocutory Mareva injunction, the court had no hesitation on the state of evidence before it, and the Mareva injunction was therefore issued as prayed.

Order accordingly.

Solicitors: *Jeffrey Tan & Co.; Vincent Lim & Teoh.*

OFFICIAL ASSIGNEE v. NGU UNG YONG

[O.C.J. (Chong Siew Fai J.) 11 September 1987]

[Sibu – Originating Motion No. 4 of 1986]

Bankruptcy – Agreement for sale and purchase of land and transfer thereof – Vendor/transferor subsequently adjudged bankrupt – Whether agreement void as against Official Assignee – "Purchaser" – "Good faith" – Meanings of – Onus of proof – Bankruptcy Act 1967, s. 52(1).

On 25 September 1981, Kong Yuok Ung entered into a sale and purchase agreement of two parcels of land of which he was the registered proprietor. The transfer of the lands was thereafter duly made.

On 9 July 1984, Kong Yuok Ung was adjudged a bankrupt. By an amended originating motion, the Official Assignee claimed that the sale and purchase agreement was void as against the Official Assignee under section 52(1) of the Bankruptcy Act 1967. The grounds for the motion stated, *inter alia,* that the purported dealing was not genuine or *bona fide* for valuable consideration but a voluntary settlement in disguise with the intent on the part of the bankrupt to defraud his creditors and with the collusion of the respondent, Ngu Ung Yong, the other party to the agreement.

Held, dismissing the amended motion: (1) the agreement and the transfer were not in any way tainted with illegality under any of the provisions of the Land Code (Cap. 81);

(2) under section 52(1), the onus of proof of the lack of good faith and lack of valuable consideration is on the Official Assignee. The word "purchaser" is to be construed in the ordinary commercial sense and means a person who has given value. In order to constitute a purcha-